No. 80-819

In the Supreme Court of the United States

OCTOBER TERM, 1980

BRISTOL SPRING MANUFACTURING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that union payments to employees for their assistance in an investigation of unfair labor practice charges against the employer did not have a tendency to interfere with the result of a representation election.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 1

Argument 3

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Collins & Aikman Corp. v. *NLRB*, 383 F. 2d 722 5

NLRB v. *Basic Wire Products, Inc.*, 516 F. 2d 261 5

NLRB v. *Savair Manufacturing Co.*, 414 U.S. 270 3

Plastic Masters, Inc. v. *NLRB*, 512 F. 2d 449 5

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 4

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2

Section 8(a)(5), 29 U.S.C. 158(a)(5) 2

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) is not reported. The supplemental decision and order of the National Labor Relations Board (Pet. App. B1-B3) are reported at 247 N.L.R.B. No. 34. The court's initial opinion remanding the case to the Board (Pet. App. C1-C6) is reported at 579 F. 2d 704. The Board's initial decision and order (Pet. App. D1-D14) are reported at 231 N.L.R.B. 568.

JURISDICTION

The court of appeals entered its judgment on September 19, 1980. The petition for a writ of certiorari was filed on November 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in Appendix E to the petition.

STATEMENT

In April 1976, the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251 ("the Union") won a representation election among petitioner's employees by a vote of 43 to 36, with seven challenged ballots. Petitioner filed objections to the election, alleging, *inter alia*, that the Union used financial inducements to influence employees' votes. After an administrative investigation, the Regional Director recommended that the challenge to one ballot be sustained, that the Company's objections be overruled, and that the Union be certified as the employees' bargaining representative. The Board certified the Union, rejecting the Company's exceptions to the Regional Director's report. (Pet. App. D3-D4.)

Subsequently, petitioner refused to bargain with the Union, claiming that certification was improper in light of

pre-election payments to employees. The Board, on summary judgment, found that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). On application for enforcement of the Board's decision and order, the court of appeals held that unresolved questions of fact concerning the effect of the challenged disbursements precluded enforcement and remanded for an evidentiary hearing on that issue. Accordingly, an administrative law judge conducted a hearing and made the findings of fact summarized below. (Pet. App. B5-B6.)

Two months before the election, the Union filed unfair labor practice charges against the employer for discharging two employees. On two occasions thereafter, employees met after work to give statements to Board agents investigating the discharges. The day after the first meeting, the Union issued checks in the amount of five dollars to each of the seven employees in attendance. (Pet. App. B6-B7.) Because of a clerical error, each of the four employees at the second meeting was paid twenty dollars instead of five dollars. (Pet. App. B8.) The Union representative did not explain that the checks constituted compensation for their assistance in the investigation; the employees involved, however, understood that to be the purpose of the payments. In addition, that is how they described the payments in their discussions with other employees. (Pet. App. B11-B12.)

The administrative law judge found "that the purpose of the payments was for time spent by the recipients in assisting the Union, the assistance consisting of giving statements in aid of an investigation of unfair labor practice charges" (Pet. App. B9). Although noting that there was no basis for concluding that either receipt or knowledge of the payments had affected the vote of any employee, he pointed out that the appropriate test was "objective," *i.e.*, "the tendency of the conduct in question to interfere with the results of an

election" (Pet. App. B10-B11). He found that the payments made by the Union in this case had no such tendency (Pet. App. B11). In each case the payments were received shortly after the statements were made and in some cases the recipients had already signed union authorization cards when the payments were made.

The Board adopted the conclusions of the administrative law judge and agreed that the payments provided no grounds for setting aside the election (Pet. App. B2). In so doing, however, the Board specifically rejected the administrative law judge's apparent assumption that the $20 payments were in gross disproportion to the amount necessary to compensate the employees for their assistance (Pet. App. B3-B4 n.6).

The Board also disagreed with the administrative law judge's statement that *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), was inapplicable here (Pet. App. B4 n.6). The Board noted, however, that because the administrative law judge's "treatment of the effects of the payments actually conforms to the standard set out in *Savair*, we do not disturb his conclusion" (*ibid.*). Accordingly, the Board reissued its original order requiring petitioner to bargain with the Union.

The court of appeals in an unpublished order upheld the Board's decision and enforced its order (Pet. App. A1-A3).

ARGUMENT

1. In *Savair* this Court found that a union promise to waive initiation fees only for employees who signed union authorization cards prior to the election constituted an improper economic inducement to support the union. 414 U.S. at 277. As the court of appeals correctly noted in its original opinion, *Savair* did not establish a *per se* rule that any payments made by a union to employees during an election campaign necessarily invalidate the result of the

election; "[r]ather, the cases establish that cash payments can, under some circumstances, improperly influence an election" (Pet. App. C4; emphasis omitted).

Petitioner does not dispute this principle. Rather, it contends that, in assessing whether the payments here influenced the election, the Board improperly applied a subjective rather than an objective test. The administrative law judge, whose decision on this point was adopted by the Board, articulated and applied the standard suggested by petitioner. Thus, although he found no evidence that the vote of any employee was actually influenced by the payments, he expressly noted that "[i]n the final analysis, * * * the test of interference is an objective one * * *" (Pet. App. B11).

2. The second question presented by the petition—whether "[u]nder the circumstances of this case" the payments should "be deemed so grossly disproportionate that they had a tendency to destroy the standards of conduct necessary for a fair NLRB election" (Pet. 2)—turns on the facts of this case and presents no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the Board reasonably found the payments not to be disproportionate to the value of the services rendered (Pet. App. B3-B4 n.6):

> [W]e agree[] that the purpose of the payments was for time spent by the recipients in giving statements in aid of an investigation of unfair labor practice charges. That time, from 1 to 3 hours and after normal working hours, involved some inconvenience to the employees. Each of them had to rearrange their [*sic*] evening, leaving their homes, and travel to the location at which the statements were given; two of the four who received $20 took time off from part-time jobs. In light of the fact that the payments were issued within 2 days of the statements and 4 weeks prior to the election[,] that the

> intended purpose was to reimburse the recipients for time spent giving their statements[,] that both the recipients and their fellow employees understood the purpose to be such [,] and that the value of the recipients' time and inconvenience cannot be definitively calculated, we are unable to say that the payments were so grossly disproportionate as to have the effect of making employees feel obligated to vote for the Union.

Contrary to petitioner's assertion (Pet. 4-5), neither *Collins & Aikman Corp.* v. *NLRB*, 383 F. 2d 722 (4th Cir. 1967), nor *Plastic Masters, Inc.* v. *NLRB*, 512 F. 2d 449 (6th Cir. 1975), conflicts with the decision of the court of appeals. Both cases involved payments to employees in connection with union election campaign activities, ostensibly made as compensation for lost wages.[1] Here, of course, the payments were made for services rendered in connection with the investigation of the employer's alleged unfair labor practice in discharging two employees and, as the Board concluded, were reasonable in light of the time spent and inconvenience of giving the statements after working hours. Compare *NLRB* v. *Basic Wire Products, Inc.*, 516 F. 2d 261, 264-265 (6th Cir. 1975).

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[1]In *Collins & Aikman* "the election was decided by one vote" (383 F. 2d at 728) and the union "made false representations of wage rates it had negotiated at a competing plant" (383 F. 2d at 729) *and* induced an employee to serve as a union election observer by promising him a full day's pay for 1 1/2 hours of work, after the employee had refused to serve in return for compensation for actual lost wages (*ibid.*). Similarly, in *Plastic Masters*, the union made substantial payments to a "highly respected and influential" (512 F. 2d at 450) employee and thereby "acquired the services of a man who was in a position of prestige" (*id.* at 451). The court found that "through the economic inducement offered by the Union, the activities of [the employee] as a pro-union advocate may have affected the outcome of a 51 to 46 election" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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